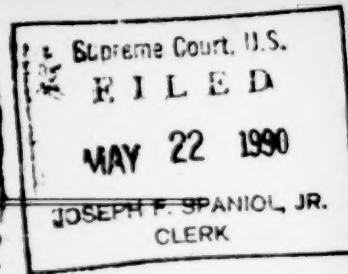


No. 89-1550



In The
Supreme Court of the United States
October Term, 1989

JERRY C. PENDERGRASS,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

On Petition for The Writ of Certiorari to the
Court of Criminal Appeals of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI

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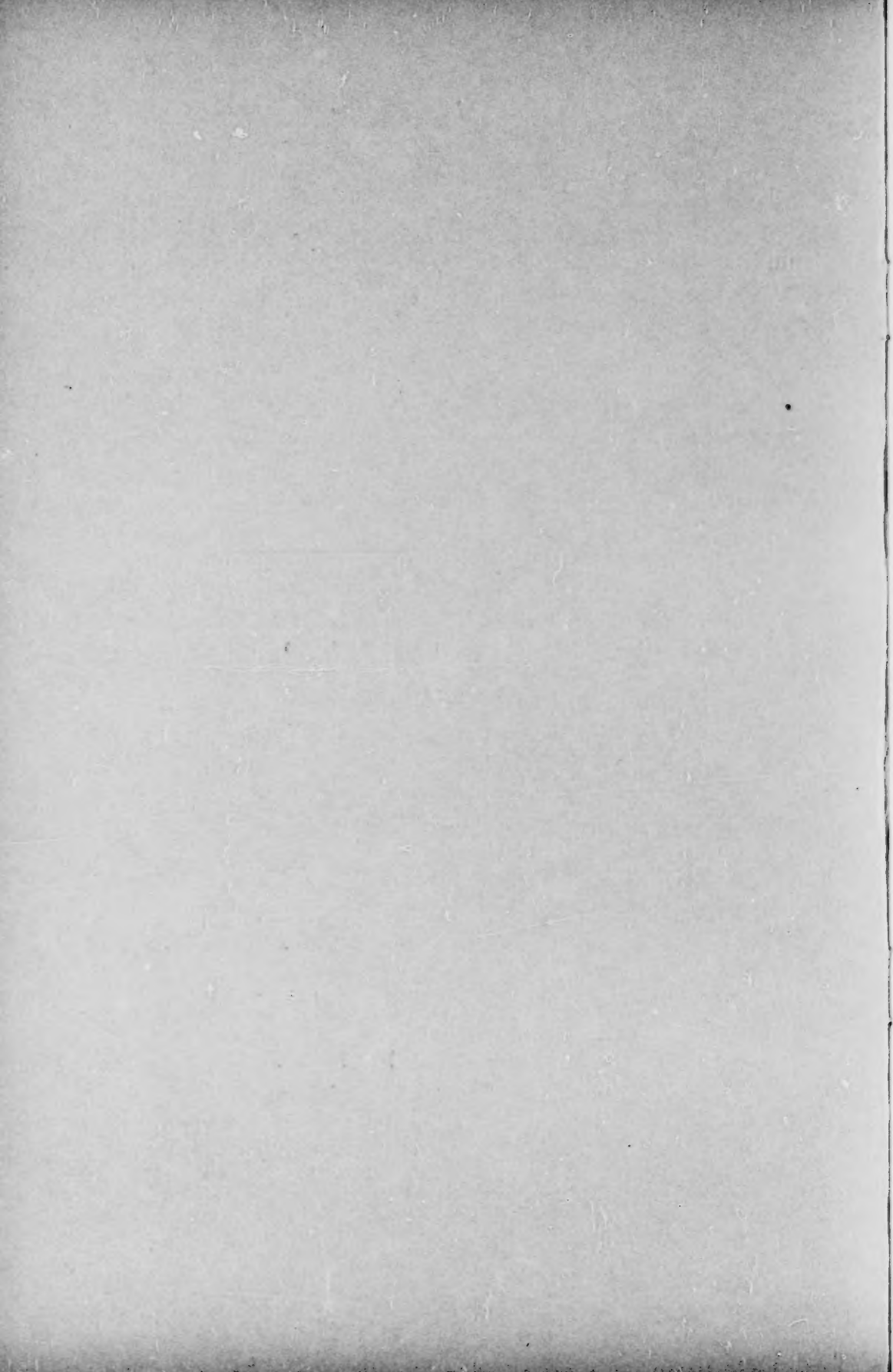
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QUESTIONS PRESENTED

1. Whether the First and Fourteenth Amendments prohibit a State trial court, in ruling on a request for probation, from considering the likelihood that an obscenity defendant will violate State law by continued operation of an adult bookstore.

2. Whether the State must offer expert proof of the community standards of a deviant group in order to prosecute the distribution of obscene materials directed towards members of that group.

3. Whether the burden of proof is shifted to the defendant by requiring him to establish as an exception to the criminal statute that the design or distribution of obscene material was limited to a particular sexually deviant group.

4. Whether this Court should overrule or modify *Miller v. California*.

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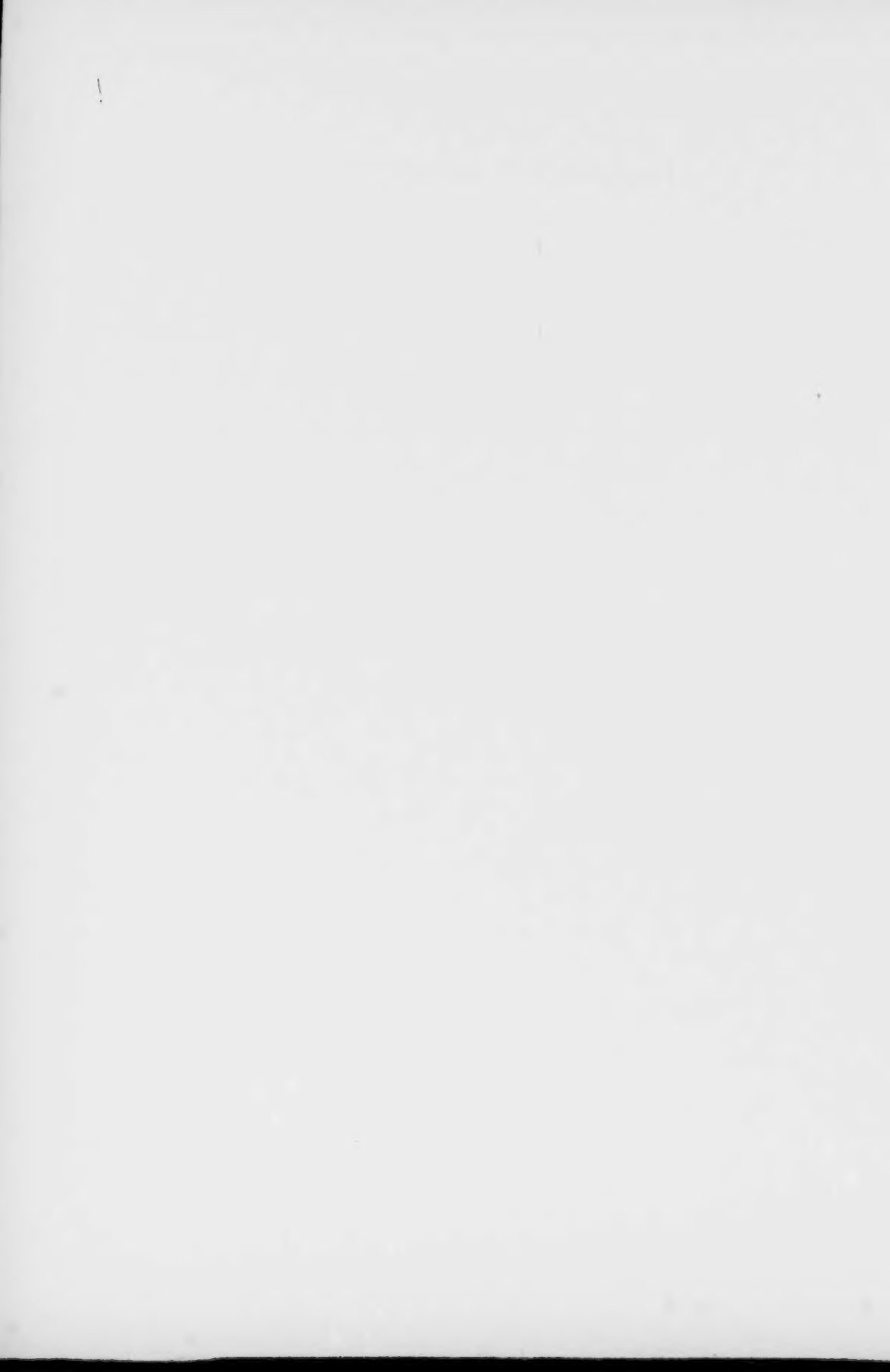
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**RESPONDENT'S BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI**

The respondent, the State of Tennessee, respectfully
submits this response to the petition for writ of certiorari
by the petitioner, Jerry C. Pendergrass.

OPINION BELOW

The Opinion of the Court of Criminal Appeals of
Tennessee is attached to the petition.

JURISDICTION

The judgment of the Court of Criminal Appeals of Tennessee was entered on September 20, 1989. On October 16, 1989, the Court of Criminal Appeals denied the petitioner's petition to rehear. On January 2, 1990, the Supreme Court of Tennessee denied the petitioner's application for permission to appeal.

The petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

The petitioner, Jerry C. Pendergrass, was convicted by a jury of six (6) counts of possession of obscene material with intent to distribute. The jury assessed a fine of \$1,000.00 on each count. The trial court subsequently conducted a sentencing hearing and sentenced the petitioner to six months imprisonment on each count, all sentences to be served concurrently. The trial court also approved the fine set by the jury.

The petitioner appealed to the Court of Criminal Appeals of Tennessee, which affirmed the convictions and sentence on September 20, 1989. On October 16, 1989, the Court of Criminal Appeals denied the petitioner's petition to rehear. The petitioner filed a timely application for permission to appeal, which was denied by the Supreme Court of Tennessee on January 2, 1990.

ARGUMENT

I. A STATE TRIAL COURT RULING ON A REQUEST FOR PROBATION MAY CONSIDER THE LIKELIHOOD THAT AN OBSCENITY DEFENDANT WILL VIOLATE STATE LAW BY CONTINUED OPERATION OF AN ADULT BOOKSTORE.

The petitioner asserts that the trial court conditioned the granting of probation upon his willingness to close his current bookstore and that this constitutes a prior restraint of unseen material. Tennessee has construed its obscenity law to permit injunctions against the distribution of specific material, but not unidentified materials. *News Mart, Inc. v. State ex rel. Webster*, 561 S.W.2d 752 (Tenn. 1978).

Under Tennessee law, a convicted defendant must prove that he is suitable for probation. Tenn. Code Ann. § 40-21-104; *Stiller v. State*, 516 S.W.2d 617 (Tenn. 1974). The petitioner was sentenced pursuant to the "Tennessee Criminal Sentencing Reform Act of 1982," which preserved the defendant's burden of proving suitability for probation. Tenn. Code Ann. § 40-35-303(b)(1982).

The Court of Criminal Appeals affirmed the denial of probation on the basis that the petitioner was not a suitable candidate even without consideration of whether he would close his current bookstore. Appendix to Petition, pp. 27-29. The petitioner's failure to prove his suitability for probation is an adequate and independent state ground for the decision of the court below. The petitioner is asking this Court for an advisory opinion since he would have been ineligible for probation even if the trial court had taken a contrary position on the prior restraint

issue. Since this issue does not present a substantial federal question, the petition should be denied.

Furthermore, the petitioner came before the trial court as a convicted criminal seeking probation. The proof showed that he opened a new establishment in Washington County, Tennessee when his Chattanooga stores were closed by court order and that the inventory of the new store consisted of the inventory from Chattanooga which had been declared obscene. After the Washington County store was closed, he opened another similar establishment in Hamilton County, which the trial court suggested he close before probation would be considered.

The petitioner testified that he ordered inventory for his stores and that he knew what he was ordering for some, but not all magazines. His stores showed gay movies and posted announcements inside the store that homosexual movies would be shown on a certain day. His current business carries material similar to the material sold in his other stores, including magazines portraying nudity and homosexuality.

The petitioner defined hard core pornography as that showing sexual arousal or penetration whereas soft core pornography depicted nudity and simulated sexual acts. He estimated that his inventory was 99% soft core and said that he tried to avoid the very sexually explicit material. He claimed that he had not watched any of the videos for which he was prosecuted and did not know whether they were obscene. His own definition of obscenity was limited to animal and child pornography.

The petitioner's testimony established that he was making no effort to rid his newest store of obscene material. The proof showed that he stocked some materials which are constitutionally protected. Nonetheless, it was evident that his indifferent attitude toward his inventory and his limited definition of obscenity created a substantial probability, if not a virtual certainty, that he would continue to distribute obscene materials unless he closed his newest bookstore. A transfer of his interest in the business would likewise violate the obscenity statute.

The trial court thought only incarceration would punish the petitioner. Appendix to Petition, pp. 42-43. He wanted to avoid censorship and indicated that probation would be considered primarily because the local jail was overcrowded. Furthermore, he indicated only that he would consider the closing of the store as a factor in the probation decision. Appendix to Petition, p. 45.

Tennessee law permits the trial court to consider whether a defendant seeking probation is likely to violate the law. Tenn. Code Ann. § 40-35-103(5). Since the petitioner insisted upon continuing the operation of his business, the State should not be required to ignore the unreasonably high risk that he would repeat his crimes.

II. THE DISTRIBUTION OF OBSCENE MATERIALS INTENDED FOR MEMBERS OF A DEVIANT GROUP MAY BE PROSECUTED WITHOUT EXPERT PROOF OF THE COMMUNITY STANDARDS OF THAT GROUP.

The petitioner asserts that the obscene material at issue appeals to a specific deviant group, homosexuals,

such that the jury was unable to judge the material's prurient appeal to members of that group without expert proof on the contemporary community standards of homosexuals. Since this proposition is an unwarranted expansion of *Mishkin*, the petition should be denied.

If evidence establishes that the material was designed for and primarily disseminated to a clearly defined deviant sexual group, the prurient appeal requirement can be satisfied by permitting the material in question to be assessed in terms of the interests of the group. *Mishkin v. State of New York*, 383 U.S. 502, 509 (1966). The petitioner is asking this Court to extend this rule to limit consideration of community standards to those standards held by a deviant subculture. The analysis in *Mishkin* is limited to assessing only the prurient interest element of *Miller*.

The three-part test of obscenity was set forth in *Miller v. California*, 413 U.S. 15, 24 (1973). This Court has refused to assess the literary, artistic, political or scientific value test in terms of contemporary community standards. *Smith v. United States*, 431 U.S. 291 (1977). Although the interests of a deviant subgroup would be relevant to assessing prurient appeal, the community standards of that group are irrelevant to the question of whether the general community would regard the material as appealing to a shameful or morbid interest in sex.

This Court has indicated that allegedly obscene materials may be directed at such a bizarre deviant group that the experience of the jury may be plainly inadequate to judge its appeal to the prurient interest. *Paris Adult Theatre I v. Slayton*, 413 U.S. 49, 56, fn. 6 (1973). While the practices of some groups may be so bizarre or repulsive

that an ordinary person would need expert assistance, the petitioner gives no reason to place homosexuality in such a category. The petitioner is asking this Court to require expert proof in any obscenity case involving material not directed at heterosexuals.

The trial court instructed the jury to judge the prurient appeal of the material in terms of the sexual interests of its intended and probable recipient group. Ordinary jurors can assess the prurient appeal of material intended for homosexuals without expert guidance. Since the petitioner's conviction complied with the standards of *Mishkin*, the petition should be denied.

III. A CRIMINAL DEFENDANT MAY BE REQUIRED TO ESTABLISH AS AN EXCEPTION TO A CRIMINAL STATUTE THAT THE INTENDED DESIGN OR DISTRIBUTION OF OBSCENE MATERIAL WAS LIMITED TO A PARTICULAR SEXUALLY DEVIANT GROUP.

The petitioner complains that the State should have proven the contemporary community standards of Tennessee homosexuals since his material was designed for and primarily disseminated to that group. As set forth in part II of this Argument, the *Mishkin* rule does not apply to the community standards element, so that any error in this regard is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

As to the prurient interest component, the court below found that the petitioner failed to meet his burden of establishing that his material was designed for and primarily disseminated to a particularly sexually deviant group. Appendix to Petition, pp. 15-16. Since Tennessee

considers this to be an exception to a criminal statute, and not an element of an offense, the State has not shifted the burden of proof to the petitioner.

The *Mishkin* rule applies only if there is evidence which establishes that the material was designed for and primarily disseminated to a clearly defined deviant sexual group. *Mishkin, supra*. Under the general obscenity statute, prurient interest may be determined by the standards of average persons. Tenn. Code Ann. § 39-6-1101(5). The rule appears to create an exception to prosecution under a generally applicable criminal statute. Under Tennessee law, the defendant has the burden of proving that he comes within an exception to a criminal statute. *Terrell v. State*, 210 Tenn. 632, 361 S.W.2d 489, 492 (1962).

The State may not require a criminal defendant to prove an essential element of the offense since that would deny him his constitutional presumption of innocence. *Sandstrom v. Montana*, 442 U.S. 510 (1979). A person who is presumed innocent of the offense is presumed ignorant of the circumstances of the offense and should not have to establish his innocence. The nature and character of material admitted into evidence, however, is readily ascertainable by either party. If a defendant wishes to claim the benefit of an alternative standard for evaluating that evidence, due process is not offended by requiring him to make a threshold showing that the exception applies.

IV. WHETHER THIS COURT SHOULD OVERRULE OR MODIFY *MILLER V. CALIFORNIA*.

The petitioner suggests that this Court should overrule or modify its previous holding in *Miller v. California*,

supra. Regardless of the need or desirability of doing so, this case is not the appropriate vehicle for such action. As such, the petition should be denied.

The petitioner asserts that the First Amendment should prohibit prosecution for mere possession or sale of obscene materials. The petitioner was not prosecuted for simply possessing the material in the privacy of his home. The proof established that the materials were part of his substantial inventory at a business devoted to the distribution of obscene and other adult-oriented materials.

The Clerk of this Court has received the exhibits from the trial. The titles of the materials convey accurately the value of these magazines and videotapes. *See* Appendix to Petition, pp. 5-8. The magazines graphically portray sexual conduct in a variety of forms without any pretense of value. The videotapes depict explicit homosexual conduct with little, if any, dialogue. Only one videotape, "Good Sex," maintains any pretense of a plot.

An examination of these exhibits will show that the petitioner's conviction should be affirmed under any standard of obscenity except one which extends full constitutional protection to obscene materials. The action requested herein would be better reserved for a case in which the material presents at least an arguable claim of minimal value. Since the material in the instant case cannot meet even that standard, the petition should be denied.

CONCLUSION

For these reasons, the State of Tennessee submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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